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NO. 81-6629

IN THE

**SUPREME COURT OF THE UNITED STATES OF AMERICA**

OCTOBER TERM 1981

VLADIMIR N. ETLIN,

*Petitioner*

*v.*

CHARLES S. ROBB,

*Governor of Virginia;*

GERALD L. BALILES,

*Attorney General of Virginia;*

and

LEWIS H. GRIFFITH,

*Circuit Court Judge for the Nineteenth Judicial Circuit of Virginia;*

*Respondents*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**BRIEF IN OPPOSITION**

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VLADIMIR N. ETLIN,

v.

CHARLES S. ROBB, etc., *et al.*

**On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

**BRIEF IN OPPOSITION**

**QUESTION PRESENTED**

**DID THE DISTRICT COURT PROPERLY ABSTAIN FROM EXCERCISING JURISDICTION OVER THIS CASE INVOLVING DOMESTIC RELATIONS LAW, WHERE STATE LAW PROVIDES THE PETITIONER AN ADEQUATE OPPORTUNITY TO PRESENT HIS CONSTITUTIONAL CLAIMS IN AN ONGOING STATE PROCEEDING?**

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## INTRODUCTION

Vladimir N. Etlin has petitioned the Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. He asks this Court to review the Court of Appeals' decision affirming an order by the United States District Court for the Eastern District of Virginia, Alexandria Division. The District Court dismissed Etlin's complaint on abstention grounds. The complaint alleged that various provisions of Virginia's domestic relations law, and actions taken under that law in a custody and child support proceeding, deprived Etlin of his civil rights. This brief presents the reasons why this Court should not review the case. Rule 22.1 of the Rules of the Supreme Court of the United States.

## REPORTS OF DECISIONS BELOW

None of the decisions below have been reported. The citations of those decisions are as follows:

1. *Etlin v. Dalton, et al.*, No. 81-0257-A (E.D. Va., Alexandria Div., July 10, 1981) [Order of the District Court.]
2. *Etlin v. Dalton, et al.*, No. 81-1760 (4th Cir. December 30, 1981) [Per Curiam Opinion by the Court of Appeals.]
3. *Etlin v. Dalton, et al.*, No. 81-1760 (4th Cir. February 2, 1982) [Order by the Court of Appeals denying Petition for Rehearing.]

## JURISDICTION OF THE SUPREME COURT

This Court has jurisdiction to consider this Petition under 28 U.S.C. §§ 1254(1) and 2101(c).

Etlin's certificate of service indicates that he desires to proceed in this Court *in forma pauperis* under Rule 46 of the Supreme Court Rules. Petitioner has not, however, complied with the Rule. Respondents were served with neither his motion for leave to proceed *in forma pauperis* nor his supporting affidavit, as required by U.S. Sup. Ct. Rules 46.4 and 28. Respondents have no way of knowing whether Etlin comes within the requirements of 28 U.S.C. § 1915. Therefore,

Respondents object to Petitioner proceeding *in forma pauperis*. If Etlin does not desire to proceed *in forma pauperis*, Respondents object to the form of his petition for writ of certiorari.

## APPLICABLE PROVISIONS OF LAW

Etlin refers the Court to several constitutional and statutory provisions which he says are involved. He relies on these provisions to argue that Virginia's child custody and support laws are unconstitutional.

At this stage of the proceedings, however, the only issue is whether the lower courts properly applied the federal abstention doctrine. The District Court and Court of Appeals determined that Etlin's constitutional claim could have been resolved in the ongoing custody and support proceedings in state court.

The pertinent provisions of state law concerning custody and maintenance proceedings are set out below:

> Va. Code § 16.1-242 (1981 Cum.Supp.)
>
> When jurisdiction has been obtained by the court in the case of any child, such jurisdiction may be retained by the court until such person becomes twenty-one years of age, except when the person is in the custody of the Department or when jurisdiction is divested under the provisions of § 16.1-244.
>
> Va. Code § 20-108 (1975 Repl.)
>
> The court may, from time to time after decreeing as provided in the preceding section (§ 20-107), on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require.

Va. Code § 31-17 (1979 Repl.)

> No such order or orders touching the custody of the child or children or the access of either parent thereto shall be made, except upon reasonable notice to the father or mother or other person having custody of the child or children. At any time after making any such order or orders the court of judge in vacation, for good cause shown, may vary, modify or annul same.

## STATEMENT OF THE CASE

On February 26, 1981, the Honorable Lewis H. Griffith, Judge of the Circuit Court for the County of Fairfax, Virginia, entered an order awarding custody of Petitioner's son, Daniel Etlin, to Petitioner's ex-wife, Michelle Etlin. The order also awarded child support to Ms. Etlin. On March 17, 1981, Petitioner brought this civil action in the United States District Court for the Eastern District of Virginia, Alexandria Division. He named as defendants John N. Dalton, then Governor of Virginia; J. Marshall Coleman, then Attorney General of Virginia; and Judge Griffith.[1]

The complaint alleged that Petitioner had been deprived of his rights under the First, Fifth, Thirteenth, and Fourteenth Amendments to the United States Constitution. Jurisdiction was asserted under 28 U.S.C. §§ 1343(3), 2201, 2202 and 42 U.S.C. § 1983.

The Defendants moved the District Court to dismiss Etlin's complaint. In an order dated July 10, 1981, the District Court abstained from hearing the matters raised by the complaint and dismissed the action without prejudice. The basis of the District Court's decision was that "the constitutional questions raised in this action may be raised in the pending State court action." On appeal to the Fourth Circuit Court of Appeals, that order was affirmed in a *per curiam* opinion rendered December 30,

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[1]Charles S. Robb and Gerald L. Baliles are now the Governor and Attorney General of Virginia, respectively, and Etlin has named them as Respondents before this Court as the true parties in interest.

1981. Etlin's petition for rehearing was denied on February 2, 1982. He has petitioned this Court for a writ of certiorari to review the decisions of the Court of Appeals.

## SUMMARY OF ARGUMENT

The lower courts were competent to interpret Virginia's domestic relations law, and their interpretation does not require review by this Court. Abstention based on that interpretation was entirely proper under the decisions of this Court, especially in light of the traditional state authority over domestic relations. Consequently, the case is not one which this Court should review for "special and important reasons," Rule 17, and the petition should be denied.

## ARGUMENT

### A.

### THE LOWER COURTS' INTERPRETATION OF VIRGINIA LAW SHOULD BE ACCEPTED

The lower federal courts interpreted Virginia law to allow state court modification of child custody determinations and support orders at any time. This interpretation involved only questions of state law and should be followed by this Court. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 462 (1967). Where the application of federal law depends on the proper interpretation of state law by the lower federal courts, that interpretation should not be overturned unless it is clearly erroneous. *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959).

### B.

### THE LOWER COURTS PROPERLY ABSTAINED

The doctrine of abstention requires Etlin to litigate his federal constitutional claims fully in pending state court proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). In this

case, Etlin sought redress from an Order of the Fairfax County Circuit Court entered on February 15, 1981. The order entered by Judge Griffith is subject to modification upon proper application to the court. Va. Code. §§ 20-108, 31-77 (1975 Repl. & 1979 Repl.). It is therefore clear that there was an ongoing state court proceeding at the time Etlin filed his complaint which, indeed, remains ongoing.[2]

Under the *Younger* doctrine, whenever declaratory and injunctive relief is available to the plaintiff in an ongoing state court proceeding, the federal court is bound to apply equitable estoppel, and dismiss the action by requiring the plaintiff to present "all claims, both state and federal, to the state courts." *Gibson v. Berryhill* 411 U.S. 564, 577 (1973). Admittedly, *Younger* involved a state criminal prosecution, but its rationale has since been extended to apply to state civil proceedings. *See Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977).

The underlying basis for federal abstention rests upon federal judicial respect for the various state functions. Each state and its institutions should be free from federal interference so that they can effectively perform their local functions. *Juidice v. Vail*, *supra*, at 334. In the case at bar, Etlin seeks federal court intervention into ongoing state court proceedings involving a matter of domestic relations. Child custody and child care are matters traditionally governed by state law. *Sosna va. Iowa*, 419 U.S. 393, 404 (1975). *See also Moore v. Sims*, *supra*. It would be inconsistent with the principles announced in *Younger* and its progeny to permit a disgruntled spouse to relitigate his state child custody and child support case in federal court. Such a course of action would unduly interfere with the legitimate functions of the State.

Etlin claims that his case falls within one of the exceptions to the *Younger* doctrine. His contention that there is no ongoing state proceeding is refuted by the express terms of applicable statutes and was rejected by the lower courts. He argues also

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[2]Although Etlin's custody proceeding occurred in the circuit court, a court of record, custody orders are also subject to modification in Virginia's courts not of record. Va. Code § 16.1-242 (1981 Cum. Supp.).

that the state court proceedings were conducted in bad faith with an intent to harass and that the challenged statutes are flagrantly and patently unconstitutional.

With regard to the first contention, the bad faith exception was created to protect the citizenry when the *government* brings a criminal prosecution solely to harass. This exception simply is not applicable to the facts in this case. There is not, nor could there be, any allegations in Etlin's complaint either that the action in the Fairfax County Circuit Court was brought by the government, or that it was brought in bad faith with an intent to harass.

With regard to the second contention, there is no allegation in the complaint that any Virginia statute is facially unconstitutional. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), the Court stated what a plaintiff must show to invoke this exception to the *Younger* doctrine:

> [The challenged statute must be] flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

Under this rigorous test, the Virginia domestic relations statutes clearly are not statutes that are patently unconstitutional. To the contrary, they are gender neutral regarding matters of custody, maintenance and support.

Petitioner's remaining contentions are groundless. Only extraordinary circumstances allow federal intervention in ongoing state proceedings. *Moore v. Sims*, *supra*, at 430; *Simopoulos v. Virginia State Board of Medicine*, 644 F.2d 321, 327-28 (4th Cir. 1981). No such extraordinary circumstances exist here. Accordingly, abstention was proper.

## CONCLUSION

The lower courts were clearly correct. They correctly applied the federal abstention doctrine, declining to interfere in domestic relations cases. They observed the appropriate deference to ongoing State proceedings in which Etlin can raise his constitutional claims. The District Court correctly abstained, and the Court of Appeals properly sustained the ruling.

The petition should be denied.

Respectfully submitted,
CHARLES S. ROBB, *et. al.*

By: John A. Gibney, Jr.
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**ENTRY OF APPEARANCE ON BEHALF OF RESPONDENTS**

I, John A. Gibney, Jr., an Assistant Attorney General of Virginia and member of the Bar of this Court, will represent the Respondents Charles S. Robb, Gerald L. Baliles, and Lewis A. Griffith in the proceedings before this Court.

John A. Gibney, Jr.
Assistant Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of June, 1982, three copies of the foregoing Brief in Opposition and Entry of Appearance were mailed, postage prepaid, to Vladimir N. Etlin, 7403 Lisle Avenue, Falls Church, Virginia 22043.

John A. Gibney, Jr.
Counsel for Respondents